No. 981.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

IN ADMIRALTY.

PAAUHAU SUGAR PLANTATION COMPANY, a corporation,

Appellant,

vs.

SAMUEL PALAPALA,

Appellee.

BRIEF OF APPELLEE.

PAGE, MCCUTCHEN & KNIGHT and
J. J. DUNNE,

Proctors for Appellee.

Pernau Press.

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The learned counsel for appellant in their statement of the facts of this case, failed to mention, as found by the court below, that at the time appellee received his injuries, the winchman on the wharf, one of appellant's employes, was not "holding it" (the sling load of sugar), "awaiting a signal from the crew in the boat to let the "sugar descend into the boat", but had rapidly lowered the sugar into the boat which contained appellee, without awaiting the signal therefor, thereby causing the injuries

complained of; and these injuries were shown to the trial court to have been far greater than a "broken collar bone "and bruises" (appellant's brief, page 3). The testimony shows that these injuries gave evidence of being permanent in their character and of a nature likely to interfere seriously, and for the immediate future totally, with libellant's capacity to earn a livelihood.

I.

The first point raised by appellant is concerned with *libellant's age.* The court will observe that this objection was not presented in any form whatsoever in the court below, and therefore cannot be considered here.

> *Flournoy v. Lastrape's,* 9 Otto 25 L. ed. 406;
> *Wasatch Mfg. Co. v. Crescent Min. Co.,* 148 U. S. 293.

It was never there contended that libellant did not have the legal capacity to maintain this action. No plea in abatement based upon his alleged minority was ever there interposed nor do we find any assignment of error asserting this objection. Said the United States District Court for the Eastern District of Pennsylvania upon this point, in the case in admiralty of

> *Knight v. The Attila,* Fed. Cas. 7,881,
>
> "If it appears on the face of the libel that the libellant is not entitled to sue, as in the case of an infant or a married woman, the respondent may demur; *but if the incapacity does not appear in the libel, although true in point of fact, then the respondent must take advantage of it by pleading in bar or by answer.*"

In the Hawaiian case of

Chin Hee v. Ho Yam Ke, 8 Hawaiian Rep. 285,

the question of infancy was properly raised by a plea in abatement. Had it been raised during the trial, it would have been proper for the court below to have appointed a guardian *ad litem* for the libellant, if shown to be under legal age, and to have then further proceeded with the trial.

The first assignment does not necessarily indicate an objection on appellant's part that libellant did not have the legal capacity to sue. It goes to the determination of the fact found by the court below respecting his age, presumably as a factor in the determination of the amount of damages awarded him. Had the court found that he was 20 or 21 years of age when the evidence showed he was 50 years or thereabouts, appellant might properly complain under its first assignment of error because this difference in age would tend to materially affect the extent to which libellant had been financially injured by appellant's negligence. Of what practical difference is it, however, in the determination of this question, in view of the evidence, whether libellant was in his twenty-first year and within a couple of months of being twenty-one years of age when he was injured or had actually passed his twenty-first birthday shortly thereafter. The distinction is too infinitesimal to be of moment in fixing the amount of damages in the decree and the trial court must have so recognized it in holding that "the libel- " lant was at the time of the injury some twenty-one years " of age, a strong, healthy man," etc. (transcript, p. 237).

We understand that the learned counsel contend that generally "admiralty courts conform to the course of "practice prevailing in other" (*i. e.* local) "courts in "respect to parties disqualified from suing in their own "right" (Brief, p. 4); but in asserting that "it is "also clear that the libellant was a minor at the time of "the trial, and consequently could not bring this libel in "his own name, but should have done so by guardian or "his father", they have overlooked the Hawaiian law upon this subject. The *Civil Laws of that Territory,* edition of 1897, provide, in Chapter 136, as follows:

"LEGAL MAJORITY.

"§ 2144. All male persons residing in this Republic, who shall have attained the age of *twenty* years, and all females who shall have attained the age of eighteen years, shall be regarded as of legal age, and their period of minority to have ceased."

See *Wood v. Green,* 2 Haw. Rep. 168.

It may be finally suggested, upon this point, if appellant still insists on raising the question of appellee's legal capacity to sue that, as the former insists that admiralty causes on appeal to this court are tried *de novo,* involving thereby an unqualified review of the appeal thereof, appellee has certainly now attained his majority and thereby become of legal capacity to maintain the action, and the services of a guardian *ad litem* are therefore unnecessary. Consequently, as the suggestion concerning his age first originated here, this court can dispose of it as of the present time, having reference to the legal qualifications of the libellant now rather than as of an earlier time.

II.

The second point urged by appellant's counsel is concerned with the question of the *winchman's negligence.* We submit that the testimony fully warranted the finding by the trial court that:

"After a careful consideration of all the testimony "in the case, I am of opinion that the injury was not "caused by the boat being raised up on a big wave, but "that it resulted from the careless and negligent act of "the winchman in suddenly lowering the sling load of "sugar without warning, and before any signal had "been given from the man in the boat.

"The winchman was an employee of the respondent "engaged in the prosecution of its work, and as such "employee, the respondent is charged with responsi- "bility for his careless and negligent acts done in "the course of his employment and resulting in the "injury to libellant."

Appellant's contention is that the roughness of the water caused the boat into which sugar was being loaded to suddenly change its position and bring libelant into contact with the suspended bags of sugar which it claims had not immediately theretofore been lowered into or towards the boat.

No question has arisen nor doubt suggested respecting appellant's liability for the act of the winchman, and we shall presume that it is conceded the act of the winchman done in the course of his employment or prosecution

of his business was the act of the Plantation Company which employed him. Nor is there any contention that the management of the winch and machinery employed in the handling and transportation of the sugar from the wharf to the steamer's small boat was not in appellant's exclusive control, which is a fact of considerable importance.

Miller v. O. S. S. Co, 118 N. Y. 199, 208-9;
Cummings v. N. F. Co., 60 Wis. 612;
The Rob't Lewers, 114 Fed. 849.

It may be further observed that the testimony of the sailors called by libellant to which we shall shortly refer is entitled to the same full credence by this court as was accorded it by the court below. The interest of these witnesses would tempt them to color their testimony in appellants' behalf, were they so inclined; for all of them were sailors in the employ of the Wilder S. S. Co. which furnished during the trial two witnesses—its president and Capt. Nicholson—for appellant, and two affidavits in support of the latter's motion to reopen this cause, and whose relations with the Sugar Company were apparently very close. In fact, during the trial the court told libellant's counsel he would be permitted to amend his libel by making the Wilder S. S. Co. a party defendant, if he were so advised (transcript, p. 170). Therefore, we say, it was to the interests of the men who were in the boat with libellant when he was injured to make their version of the affair as favorable as possible for appellant.

Let us look at the testimony upon the subject of negligence.

Hina, one of the libellant's witnesses, who was in the same boat with him at the time of the accident, said when directly examined concerning the sugar:

"It was lowered half way down, but it was not to "be lowered to the boat before we gave the signal, but "before we gave the signal it was lowered and he was "hurt then.

"Q. How did he get hurt?

"A. By the sugar. As the sugar was lowered half-"way down, Sam Palapala and myself were covering "the first load with canvas and before we had it cov-"ered and before we notified them, the men in charge of "the winch lowered it.

"The COURT. Whose business was it to notify the "winchman to lower the sling load?

"A. The boatswain's business.

"The COURT. Who is the boatswain?

"A. Kia, the one at the back of the boat. He is the "one who signals when a large sling load is to be lowered.

"The COURT. He swears he did not signal him, does "he?

"A. No signal was given at all" (transcript, p. 44).

He further testified that the sling load of sugar struck libellant right on the breast, whereby

"He fell down, with his face up, on the port side, just "as they hoisted the sugar up again".

There was

"no notification at all from the boat" (transcript, p. 45). He further testified that the winchman could plainly see from his position into the boat, as he was above them.

On cross examination this witness said:

"When they are ready to put it" (the sling load of sugar) "in place, the one in the back of the boat is the "one who notifies the winchman to lower it down.

* * *

"As soon as the sling load is right above, where "they can catch hold, if they want it front or back, "they take their hands and try to get it just where they "want it, then the boatswain gives the order to lower "it when they are ready. * * *

"After the sling load of sugar leaves the wharf "and is carried out on the derrick it is lowered down by "the winchman half way. This is way above the men's "heads and he holds it there until the boatswain gives "the signal to lower it" (transcript, pp. 50-51).

The record upon his further cross examination shows:

"Q. I want to know what the winchman did?

"A. He lowered the sling load of sugar without being "notified to do so.

"Q. You say Palapala was one of the men whose "duty it was to receive the sling load, to take hold of it "when it got within a certain distance?

"A. Yes.

"Q. Whereabouts in the boat was Palapala at the time "the accident occurred?

"A. He was near the middle of the boat at the time "he met with the accident. In the middle, but a little "toward the stern. * * *

"Q. What was he doing at the time the accident oc-"curred?

" A. They had not gotten through fixing up the first " sling load of sugar they had received. They were " working on it.

" Q. What were they doing to it?

" A. They were covering it. The canvas cover had " gotten under the first sling load of sugar and they were " trying to get it from under to put it over the side of " the boat.

" Q. Palapala had no warning that that sling load of " sugar was coming?

" A. No.

" Q. No warning at all?

" A. No.

" Q. No warning from the crew of the boat or by the " winchman?

" A. No; he did not expect they would lower the sling " load of sugar.

" Q. Up to the time it struck you heard no warning " either by members of the crew of the boat or by the " winchman?

" A. None at all.

" Q. How quickly did it happen?

" A. At quite a short time. He was just commencing " to rise.

" Q. Who was commencing to rise?

" A. Palapala. He had just pulled up this cover " just lying alongside and commenced to stand up when " he was struck by this sling load of sugar.

" Q. Where did you say he was struck?

" A. Right on the breast here (indicating) (transcript, pp. 53-5).

* * *

"Q. On this occasion when Palapala was struck, how "far toward the bottom of the boat did this sugar de- "scend?

"A. The sling load fell on him on the edge of the "boat, when it was hoisted up again he fell in the bottom "of the boat" (transcript, p. 56).

* * *

"Nobody called out to the winchman. * * *

"Nobody called out. * * *

"Nobody gave any signal when it was lowered down "or when it was hoisted up again. * * *

"No one said a word. * * *

"No one called out. * * *

"No one of us called out. * * *

"No, no one of us called out" (transcript, pp. 58-9).

Kewiki, another one of libellant's witnesses, testified on his direct examination:

"Q. How did it come about, that the second sling "load of sugar should hurt this man?

"A. It was on account of the winchman lowering the "sling load of sugar without being notified to do so. * *

"Q. What we want to know is, at the time when it "struck Palapala, did it come down, fast or slow, how "did it come down?

"A. It came down very fast. * * *

"A. I saw the sling load of sugar. I saw it when "Palapala was hurt.

"Q. Where did it strike him?

"A. On the chest here (indicating) (transcript, p. 63).

He further testified:

" Q. Now, when this sugar struck the libellant, what " became of the sugar?

" A. The winchman hoisted it up again.

" The COURT. That is, the winchman hoisted it up, is " that so?

" A. Yes, sir.

"The COURT. Could the winchman see that boat, from " his place at the winch?

" A. Yes, he can see.

" The COURT. The winchman could see the libellant " when he was hurt?

" A. He can see. * * *

" Q. How soon after the sling load of sugar struck " Palapala was it that the winchman hoisted it up?

" A. I can see it, the bags of sugar rest on him and " were hoisted up again. * * *

" Q. Between the point of time when the sugar struck " him, and the point of time when the winchman hoisted " the sugar off Palapala, do you know whether anything " was said by anybody in that boat, to that winchman?

" A. No one of us called out.

" The COURT. Whether nothing was said?

" A. No" (transcript, pp. 64-6).

Upon cross examination he said:

" Q. Now, at the time of the accident, which way " was he (the libellant) facing, towards the landing or " towards the inside of the boat?

" A. He was not facing either way. He was fixing " the canvas, which was under the sling load of sugar.

" Q. You mean he was looking into the bottom of the " boat, fixing the canvas?

" A. Yes. * * *

" Q. How many sling loads of sugar were in the boat " at the time of the accident?

" A. One.

" Q. In what position in that boat was the sling load, " crossways or lengthways of the boat?

" A. Lengthways of the boat" (transcript, pp. 68-9).

* * *

" Q (to the interpreter). Tell him the Court wants " to know how fast—if that sling load, that is charged " with injuring this man, whether it came down so fast, " that the two men who stood in the boat could not catch " it and regulate it?

" A. Yes, it came down very fast.

" The COURT. Did it come down so fast that the two " men, who were to catch the sling load as it dropped " down—did it come so fast that they could not catch it " and guide it into the boat?

" A. Yes" (transcript, pp. 75-6).

Bob Samoa, the next witness called on libellant's behalf, testified upon his direct examination:

" Q. Just describe, in your own way, how it was that " Palapala got injured on that occasion?

" A. We were on the boat, and the boat was shifting " out and in, out and in, when this sling load of sugar fell.

" Q. Just before this sling load of sugar fell, what, if " anything was said or done, by the men on the boat?

" A. Somebody was hurt. There was nothing said.

"Q. Do you know how many bags of sugar there "were in that sling load?

"A. Ten bags.

"Q. Can you state what the weight was of each bag?

"A. One hundred and twenty-five.

"The COURT. One hundred and twenty-five pounds, "you mean?

"A. Yes.

"The COURT. In each bag?

"A. Yes. * * *

"A. It" (the sling load of sugar) "is kept there until "the boat is right under it when he lowers it down into "the boat.

"Q. When is that done?

"A. When some one calls out to lower it.

"Q. Calls out to whom?

"A. The winchman.

"Q. On the occasion when Palapala got hurt, had "anybody called out to the winchman, to drop the sugar?

"A. No one called out.

"Q. When the sugar fell, where did the sugar strike "him?

"A. Right on the breast (indicating his right breast).

"Q. How did that sugar come down? Fast or slow?

"A. Very fast. * * *

"Q. What became of the sugar?

"A. It was hoisted up again.

"Q. Who hoisted it up?

"A. The winchman.

"Q. Had any signal been given by anybody in the "boat, to the winchman to hoist up that sugar?

"A. No.

"Q. Can the winchman see the boat from the place "where the apparatus is, the winch?

"A. He can" (transcript, pp. 82-3).

* * *

"A. It was the falling of the sugar into the boat that "hurt Palapala" (transcript, p. 85).

Upon his cross examination Samoa testified as follows:

"The COURT. I ask you whether the sling came down "so fast that you could not take hold of it and regulate "its fall?

"A. It did.

"The COURT. Why?

"A. In the first place, we didn't know the winchman "was going to lower the sugar, as we didn't give him the "signal. In the second place, it came so quickly we "didn't know it was coming.

"Q. I understand you did not know it was coming "until it struck Palapala?

"A. Yes.

"The COURT. It came down very fast?

"A. Yes.

"The COURT. And you didn't see it coming down "until it struck Palapala?

"A. We did not know it until Palapala was struck" (transcript, p. 92).

He further testified that just prior to the time when Palapala was struck, he was trying to get the canvas from under the first sling load of sugar that was in the boat and he was looking at that. Palapala and himself were engaged at the same work at that time and the sugar

struck the former right on the chest (transcript, p. 93). Continuing:

"Q. Did this sugar stay on him" (the libellant) "for "any length of time?

"A. When this sling load of sugar struck him he "was knocked down and the sling load was hoisted up "again.

"Q. Who ordered it hoisted up, if anybody?

"A. Nobody ordered the sling load of sugar hoisted "up again.

"The COURT. By the winchman, of course.

"A. Yes.

"The COURT. You say nobody ordered him to do it?

"A. No one. * *

"Q. If the boat was steady, why was not the signal "given to let the sugar come down?

"A. We could not give any orders, because the can- "vas was under the first sling load of sugar. We had to "get that out before we could receive another one.

"Q. Was that the only reason the order was not given "to let the sugar come down?

"A. Yes, the only reason" (transcript, pp. 94-5).

Another one of libellant's witnesses, Kia, testified on his direct examination:

"A. I am the boatsteerer on the boat. The crew of "the boat had to take orders from me. We went up there "to receive sugar, to the wharf. We received the first "sling load of sugar alright, the second sling load of "sugar was lowered down by the winchman without "any notification from me or any of the crew, very fast.

" * * *

" A. Sam Palapala was hurt * * * right on the " breast here (indicating).

" Q. How many bags of sugar were in the sling load " that struck Palapala?

" A. Ten bags.

" Q. What was the weight of each of those bags?

" A. One hundred fifty pounds each" (transcript, pp. 96-7).

* * *

" Q. How did you keep the boat in position alongside " the wharf?

" A. There were two of the crew who attended to the " oars, they were oarsmen—that is, it was their duty to " hold the boat away from the wharf.

" Q. Do you remember what Sam Palapala was doing " just before the winchman dropped the sugar?

" A. He was trying to get that canvas out so as to " cover one side of the boat so the sugar would not " get wet" (transcript, p. 98).

On cross examination the witness said:

" The Court. Was this man injured by a reasonably " big wave coming in?

" A. He was not.

" The Court. How was he injured?

" A. He got injured on account of the winchman low- " ering that sling load of sugar without any notification " from the people in the boat.

" Q. What was the condition of the weather on that " day, as to wind and sea?

" A. It was calm so we could work.

" Q. You mean it was calm all day?

" A. It was quite calm in the afternoon. We had to " watch for our chances.

" Q. What do you mean by having to watch for your " chances?

" A. Well, we had to see when the sea was calm, that " is the time for us to go in.

" Q. During the afternoon it would be rough at times " and calm at times, and you would take advantage of " the calm moments to rush in?

" A. Yes.

" Q. There were times during that afternoon that it " was so rough that you could not work?

" A. No, we could work that afternoon.

" Q. What do you mean by saying that during that " afternoon you had to watch for your chances?

" A. We watched for our chances because sometimes " there were other boats at the landing and we watched " for them. When they came out we came in.

" The COURT. You watched for your chances with ref- " erence to the waves or something else, let us find out?

" A. Yes, we wait for our chances. We wait until one " boat is loaded, and when that boat came out, our boat " came in. Not in reference to the waves.

" The COURT. So that no time that afternoon the " storm or the waves interfered with the loading of sugar?

" A. No.

" The COURT. Neither the wind nor the waves?

" A. No.

" Q. Was there no wind at all that afternoon?

" A. There was some wind.

" Q. From which direction was it blowing?

" A. From the land.

" Q. How had the waves been in the morning, rough " or calm, big waves or small waves?

" A. In the morning, high seas, high waves.

" Q. Would you say it was very rough?

" A. It was very rough.

" Q. About what time did it calm down?

" A. I think it was after twelve o'clock.

" Q. Some time after your lunch?

" A. Yes.

" Q. How many bags were you taking off at a time in " the boat that afternoon?

" A. Two or four sling loads at a time.

" Q. Sometimes you took off two sling loads at a trip " and sometimes four, that afternoon?

" A. Yes.

" Q. Is it not a fact that when the weather is rough you " can only take off two sling loads at a trip?

" A. When it is rough, two or three sling loads.

" Q. And when it is calm?

" A. Four to five sling loads when it is calm.

" Q. Where in the boat was Palapala just before this " sugar struck him?

" A. He was on the side next to the landing, in the boat " on the right side, working on this canvas.

" Q. Stooping down trying to get this canvas from " under the sling?

" A. Yes.

" Q. It was while he was engaged in that work, as you " have described, that the sugar struck him?

" A. Yes.

" Q. When the sugar struck him what effect had it on " him?

" A. He was hurt.

" Q. Did he still continue standing?

" A. No, he fell into the boat" (transcript pp. 100-3).

* * *

" Q. (by the COURT) Are you sure that no notice was " given by the winchman before lowering the sling when " he did?

" A. There were no such instructions.

" Q. From anybody in the boat?

" A. From nobody in the boat.

" Q. How fast did it come down; did it come so fast " that the men in the boat could not regulate it or stop it?

" A. It did" (transcript p. 105).

" The COURT. Did it come down so fast that these men " could not stop or handle it?

" A. Yes.

Re-direct Examination.

" (By Mr. DUNNE).

" Q. As the sugar struck Palapala, what became of " it?

" A. It was hoisted up again.

" Q. Who hoisted it?

" A. By the winchman.

" Q. Did anybody in the boat give him an order to " hoist that sugar?

" A. No instructions from any one in the boat" (transcript p. 106).

The libellant, called on his own behalf, testified upon his direct examination:

" When we got to the wharf we received the first sling " load of sugar. The next thing I did was to try to get " the canvas with the first sling load of sugar, with the " assistance of Bob, so as to get enough canvas to prevent " the sugar from being wet. While I was fixing this, I " was stooping down when I stood up with this canvas, " that was the time I was struck with this sling load of " sugar, right in front here (indicating chest)" (transcript p. 113).

* * *

" Q. While that sugar was suspended over and above " that boat, did anybody in that boat directly or indirectly " approximately or remotely, do anything to or with that " sugar?

" A. No.

" Q. While that sugar was suspended there, was any- " thing said, and, if so, what, by any person in that boat, " to that winchman?

" A. No one.

" Q. When that sling load of sugar descended describe " its rapidity; I want the rapidity of its descent.

" A. That sling load of sugar was lowered half way " while I was tending to the canvas. This sling load of " sugar was lowered so fast that I didn't have time to get " out of the way.

"Q. Do you remember how many bags were in that "sling load?

"A. Ten bags" (transcript p. 114).

* * *

"Q. When this sling load of sugar descended, at what "rate of speed did it descend, if you know?

"A. It came down so fast nobody could handle it to "set it in place where it was wanted to be put in the boat" (transcript p. 123).

Upon cross-examination libellant testified:

"Q. Just prior to the accident what were you doing?

"A. I was fixing the canvas that was under the first "sling in the boat. I was trying to put it so as to pre- "vent the water from the sea getting to the sugar, to pre- "vent its being wet.

"Q. You wanted to put the tarpaulin or canvas so that "the waves would not wash in and wet it?

"A. Yes.

"Q. How many sling loads of sugar were in the boat "before the accident?

"A. Just one.

"Q. You are sure about that?

"A. One before the sling that came down and struck "me. * * *

"Q. Do I understand you that you did not see the sling "load that hurt you until it actually struck you?

"A. I seen the sling load lowered half way—lowered "by the winchman half-way.

"Q. After that you didn't see it again moving until "it actually struck you?

"A. Yes, sir.

"Q. You didn't see it come down to strike you?

"A. I didn't see it because I was fixing up the canvas "when I was stooping down. When I stood up the sling "load struck me on the breast.

"Q. Across the breast?

"A. Right about here (indicating the upper part of "the breast).

"Q. You say you were stooping down at that time?

"A. I was stooping down fixing the canvas to put it "to the side of the boat. When I stood up the sling load "struck me.

"Q. What about putting it to the side of the boat?

"A. The tarpaulin. I was trying to pull the tarpaulin "from under the first sling and put in more on the side "of the boat so as to cover the sling of sugar.

"Q. Had you taken the tarpaulin out from under the "first sling?

"A. I had just pulled it out.

"Q. You had just pulled it out?

"A. Yes.

"Q. You had not gotten it quite out at the time the "sugar struck you?

"A. Yes.

"Q. As a matter of fact, does not this tarpaulin lie in "the bottom of the boat always under one load of sugar?

"A. Half-way in the boat, and half of the tarpaulin at "the side of the boat" (transcript, pp. 126-8).

Captain D. F. Nicholson, who was called on appellant's behalf, testified that he was master of, and on the steamer "Helene" 350 feet away from the place of the accident (transcript, p. 160), although later he said the steamer was

lying about 100 feet away (transcript, p. 164). In reply to the question put by his counsel:

"It has been testified to, that this winchman suddenly "and without warning or signal let the sling load descend "to the boat with such rapidity that the men in the boat "could not stop; what have you to say in regard to that?" he answered: "I did not see that" (transcript, p. 163). He corroborated to some extent the testimony given by libellant's witnesses as to the condition of the weather, saying that in the afternoon it was much better than in the morning and that the men were only able to take 26 bags of sugar to the steamer in the morning, but during the entire day were able to take 1,000 bags (transcript, p. 164). He denied some of the testimony given by other witnesses called on appellant's behalf, by admitting that the winchman could, from his position, see the small boat perfectly at the time libellant was injured (transcript, p. 167); and although he limits the horizon of this man to the boat itself and its immediate surroundings (transcript, p. 169), it appears later, by the testimony of Richard Westoby, also called on appellant's behalf, that there was nothing to prevent the winchman, not only from seeing the place where the accident happened, but from looking out upon the open sea. Westoby's testimony upon this point is as follows:

"Q. Was there no signal given the winchman to hoist "the sugar?

"A. I did not see any.

"Q. Did you hear any?

"A. No.

"Q. You say the time the winchman hoisted the sugar " up, it was because he could see it?

" A. Yes.

" Q. Then the winchman saw this transaction, just as " well as you did?

" A. I suppose so.

" Q. Just before he hoisted this sugar, he had received " no signal, that you either heard or saw?

" A. I neither heard nor saw any signal.

" Q. When you speak of signal, I infer you mean the signal from the man in the boat?

" A. Yes.

" Q. There was nothing to prevent the winchman from " seeing the place where this happened?

" A. I presume not.

" Q. He could see quite clearly; there was no obstruc- " tion to prevent his seeing?

" A. No.

" Q. Could he see out upon the open sea?

" A. He could.

" Q. What had the winchman in the building to do, if " anything, to prevent his seeing the waves as they came " in?

" A. I suppose he had to keep his eye on the boat.

" Q. If he lifted his head, could he see the waves come " in?

" A. Yes, if he had done so. * * *

" Q. Have you ever examined the winch that the winch- " man was working at?

" A. Yes, sir, I have.

" Q. This winch is situated in a small winch-house?

" A. Yes.

" Q. Have you been in there?

" A. Yes.

" Q. Have you looked out of this winch-house?

" A. Yes.

" Q. You can see the place where the boats come in and " the sea out beyond?

" A. Yes.

" Q. You said you were looking through the window " and you saw the sling load of sugar hanging there, with " the boat underneath it. You also said you saw two men " there ready to receive the sugar; is that correct? * * *

" A. There were two men ready to receive it and trim " it. There are two men there with every boat to re- " ceive it. These men were standing ready to receive the " sugar, as usual.

" Q. When you describe that point you put up your " hands, indicating that the men were reaching for the " sugar?

" A. I did" (transcript, pp. 178-80).

Captain Nicholson placed the responsibility of the accident on no one (transcript, p. 170). The witness Westoby admitted that it was the duty of the winchman to keep his eye on the boat so as to be ready to receive the signal of the man in the boat to lower the sugar and that in lowering the sugar the winchman was guided by the signals from the man in the boat (transcript, p. 182).

S. Fujimoto, who was called on appellant's behalf, testified that he had as good a view of the occurrence as did

Naka, another one of appellant's witnesses, but that he could not see in what position libellant's arms were at the time of the accident, nor could he see whether or not his arms were extended (transcript, p. 194), thereby virtually contradicting Naka.

Manuel Enos, the winchman, also called on appellant's behalf, said, contradicting in part Captain Nicholson's testimony:

" Q. You say the sea was awful rough?

" A. Yes.

" Q. How did you know; did you see it?

" A. Yes.

" Q. Where did you see it?

" A. From the donkey.

" Q. From the donkey you could see when the weather " was awful rough, could you? (Interpreter here trans- " lates).

" A. Yes.

" Q. While you were in the well of the donkey, you " could see the landing and you could see the waves com- " ing in?

" A. Sometimes I could not see.

" Q. Why not?

" A. When the waves are close to the boat I cannot see.

" Q. You can see when the weather is awful rough, " you can see the waves coming in, can't you?

" A. Sometimes I can see, and sometimes I don't. My " time is practically taken up with looking at the men in " the boat.

" Q. Suppose you look, can you see these waves come " in?

" A. Suppose I look, yes.

" Q. There was nothing to prevent your seeing if you " want to; you can see if you want to?

" A. Yes" (transcript, pp. 200-01).

He explained that a big wave came under the boat, pushing it towards the landing just at the time libellant was injured.

" With the rising of the water the man got struck, and " when the man got struck I hoisted up the sugar at the " same time. * * *

" Q. Why didn't you hoist that sugar in the first place " instead of waiting until this man got his collar-bone " fractured?

" A. I didn't see this wave coming up.

" Q. Why didn't you see this wave coming up?

" A. I could not see it; I was watching the men in the " boat.

" Q. Didn't you go to work that day with the knowl- " edge in your head that the weather was awful rough?

" A. I could see it was rough" (transcript, p. 202).

This witness is the only one who states that any signal was given to him to hoist the sugar up, his self-interest apparently inducing him to testify as follows:

" Q. Did anybody give you a signal to hoist that sugar " up?

" A. Yes.

"Q. Point out the man in these four (comprising the " boat's crew with the libelant) who signaled to you to " hoist the sugar after this man got struck; identify him.

" A. That fat man (indicating witness named Bob " Toka).

" Q. You mean this man (indicating Bob Toka)?

" A. Yes.

" Q. When he signaled you to pull that sugar up again, " how did he do it?

" A. By that motion (indicating upward motion of " both hands).

" Q. By throwing up his hands?

" A. Yes.

" Q. When he did that was there anything to pre- " vent the other men in the boat from seeing Bob throw " up his hands in that way?

" A. I saw him make that signal. I do not know " whether the other men saw it or not.

" Q. I am asking you whether there was any physical " obstruction in or about that situation there, that pre- " vented the other men in the boat seeing Bob make such " a signal, if he made it?

" A. I do not know.

" Q. Do you mean you do not know of anything that " would have prevented the other men in the boat seeing " the signal, if it was made, the signal you swore to?

" A. There was nothing in the way to prevent them " seeing the signal" (transcript, pp. 203-4).

Bob Toka, when called in rebuttal by libellant's counsel, denied that he gave a signal to the winchman and he was corroborated by Hina, Kewiki and Kia, who were also recalled upon this point. The truth is that the winchman, seeing the danger to which he had subjected libellant, moved the lever of his machine and raised the suspended bales of sugar from the prostrate form of Palapala of his own volition, despite his assertion that he received

a signal so to do from Toka. The winchman was in a position at all times to see the boat, as he received his signals from one of the crew, and he admitted that it was within his vision.

Appellant suggests, as an indication of the height of the waves, that the sugar on the wharf became wet; but it must be borne in mind that the weather had been rougher in the forenoon than it was in the afternoon when the accident took place, even according to the admission of Captain Nicholson, one of the appellant's witnesses, to say nothing of the testimony of libellant's witnesses upon this point. The sugar on the landing might have become wet in the forenoon or water might have reached it in the afternoon indirectly from waves, such as spray or from rivulets or small streams of water frequently caused by a high sea. It is of far more importance in this connection to note that the sugar which had been suspended over the water and which caused the injury, was shortly thereafter taken into the small boat and carried to the steamer in apparently a dry condition, for the testimony shows that wet sugar was not taken on board the steamer but was run through the mill so as to take therefrom its dampness. How could this sugar have been kept dry if the water was as rough as contended for by appellant?

Then again, considerable sugar was shipped that day from the shore to the steamer, about 1,000 bags in all, practically the entire quantity being shipped in the afternoon; and despite the fact that as much as five or six thousand bags of sugar are shipped in a single day under good conditions, it would have been extraordinary if

those thousand bags had been transhipped from shore to the steamer in a dry condition in exceedingly rough weather.

Appellant endeavored to prove that the motion of these waves, which it claimed were about 22½ feet in height when the accident occurred, lifted the boat upward, causing libellant to strike the suspended half ton of sugar. Several admitted facts of the case, however, demonstrate the improbability, if not impossibility, of this theory.

In the first place, if the boat were under the sugar and the former had been suddenly lifted by a tremendous wave, it would at the same time have been moved towards the shore; hence, as libellant was in the shore end of the boat, he would have been carried past the sugar, and one of the men in the other end of the boat would have received the force of the blow.

Then, the boat was maneuvering 12 or 13 feet from the rocks on shore and in this position was taking its loads of sugar. Can it be successfully contended that this boat could have been safely handled so close to shore, with the waves running 22 feet high and a strong wind blowing on shore, and at the same time have been able to receive a cargo of sugar? As the trial court remarked, it would have been dashed to pieces on the rocks.

The court will further note that, had such a heavy sea been running, with the waves dashing against the landing, it would have been impossible for the men in the boat to have heard Capt. Nicholson's whistle from the steamer "Helene", 350 feet away seawards (transcript,

pp. 159, 160), especially as the winchman could not hear a call 150 feet away (transcript, pp. 171-172).

Finally, why was the sugar raised by the winchman after libellant was injured, if it had not theretofore been lowered into the boat? If a big wave, merely, had caused the damage, the danger was then over when the wave passed. The evidence, however, is to the effect that this sugar was on top of libellant just before it was raised, which indicates it must have been first lowered into the boat; and it is not claimed on appellant's part that any signal had been given to lower the sugar. The winchman acted on his own responsibility.

Therefore, the testimony offered by appellant respecting the size of the waves on the afternoon of the day of the accident is inherently improbable, and the courts have repeatedly held that the inherent improbability of a witness' statement may deny to it all claim of belief.

Blankman v. Vallejo, 15 Cal. 638;
Sonoma v. Stofen, 125 *id.* 32;
Tracey v. Phelps, 22 Fed. 634;
Quock Ting v. U. S., 140 U. S. 417.

As hereinbefore indicated, the position taken by the libellant and his witnesses is an affirmative one that the winchman did negligently drop the sugar into the boat; whereas Captain Nicholson, on appellant's behalf, did not undertake to say that the sugar did not drop, but that he did not see it drop; and Nicholson argues that the winchman did not drop the sugar because the former did not hear the steam escaping from the winch. He takes this negative position, notwithstanding his own testimony that

the deafening crash of the surf upon the rocks would prevent the winchman, who was at a distance of 150 feet, from hearing any calls from the boat, but he used the qualifying expression in the course of his testimony "as near as I could see"; and as between the affirmative testimony of the men in the boat on the one side and the negative testimony of Nicholson on the other, it is submitted there can be no choice. Upon this character of testimony the Supreme Court of the United States remarked:

> "The plaintiff denies the receipt of any such papers, and both the defendants swear positively to their delivery to the plaintiff.
>
> "On this subject the court charged the jury 'that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.'
>
> "We are of opinion that the charge was a sound exposition of a recognized rule of evidence of frequent application, and that the reason of the rule, as stated in the charge, dispenses with the need of further comment on it here."
>
> *Stitt vs. Huidekopers,* 17 Wall. 384, 394.

Despite the attempted showing on the part of appellant that the winchman could not see the immediate surroundings of the boat, he admits himself that he could see if he looked, and this was also proven by the witness Westoby. It was therefore within the power of the winchman to so control the suspended bales of sugar as to have prevented them from causing injury to any one in the

boat. It was clearly within his view, because immediately after the accident he pulled the sling up, seeing libellant fall into the boat (transcript, pp. 197-8); and the winchman admitted that if he looked he could see the waves coming in (transcript, p. 201). Said the Supreme Court of California, in the case of

Glascock v. C. P. R. R., 73 Cal. 137, 141,

> "If he looked, he saw; and having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances."

It is a well known rule of law that the greater the hazard the greater is the care required.

Schumacher v. St. Louis etc. Ry. Co., 39 Fed. 174.

See further:

R. R. Co. v. Freeman, 174 U. S. 379;
Marland v. R. R., 123 Pa. St. 487;
R. R. v. Hobbs, 19 Am. & Eng. R. R. Cas. 337;
Burke v. Traction Co., 48 Atl. 470;
Bailey v. R. R., 110 Cal. 320, 328;
Ehrisman v. R. R., 150 Pa. St. 186;
Buzsby v. Traction Co., 126 Pa. St. 559;
Tucker v. R. R., 124 N. Y. 315.

In the case of *Mather v. Rillston*, 156 U. S. 391, Mr. Justice Field, who delivered the opinion of the court, said in part:

> "All occupations producing articles or works of necessity, utility, or convenience may undoubtedly

> be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases, where the occupation is attended with danger to life, body or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. * * * If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of.''

It is, therefore, we submit, clearly established by a preponderance of the evidence that it was the winchman's fault in lowering the sugar without a signal, rather than the height of the waves, that caused the injury to libellant.

III.

The next several assignments of error are devoted to the question of the *extent of the injuries* sustained by appellee. Again we can do no better than to set forth portions of the record upon this subject, even at the risk of unnecessarily prolonging this brief.

Hina testified that, after the accident, when the small boat got alongside of the ''Helene'', the libellant was hoisting up on board the ship in a sling (transcript, p. 46).

It thus appears that he was helpless. On cross examination he was asked by appellant's counsel:

"Q. What cry was that Palapala gave, what did he "say?

"A. Just when he was struck the force of the sling "load made him give a kind of a grunt.

"Q. Did Palapala assist himself as well as Bob?

"A. When he fell in the boat he was lying there still; "he could not move.

"Q. How do you know he could not move?

"A. When Bob was helping him—massaging him, he "could not move at all.

"Q. How long was it after that you brought him up to "the steamer?

"A. The time when he was hurt and Bob assisting, "that time we were rowing. We rowed right out to the "steamer.

"Q. How did you get aboard the boat?

"A. Strung up ropes and hoisted him up. Getting "him into position with ropes, we hoisted him up. We "tied up the ropes so we could hitch him in and "hoisted him up easily until he came to the steamer.

"Q. Was he hoisted by the crane?

"A. By the steam" (transcript, p. 60).

Kewiki testified that when the sling load of sugar struck libellant, the witness heard a groan and libellant then fell into the boat and laid there as if he were dead. One of the men then began to massage him and the boat rowed out to the steamer, the libellant being hoisted on board of her by means of a sling (transcript, p. 64). On cross examination, in reply to the question, "In what position

" when the sugar was raised off of him?" he answered, " He was like a dead man. He laid on the right of the " boat, in the boat" (transcript, p. 73).

Bob Samoa said that when the sling load of sugar was lifted up by the winchman, libellant laid as if he were dead and witness then massaged him and the men in the boat fixed a sling and thereby hoisted libellant on the deck of the steamer (transcript, pp. 83-4). On cross examination, counsel asked, "Can you say what was the " effect of it on Palapala?" and the witness answered, " He fell down and laid there like a dead man * * * " in the boat" (transcript, p. 93).

Kia testified that after libellant was struck he fell down and Bob Samoa jumped down to help and put him in a better place. Libellant could not get up at all as he was helpless. Thereafter he was put in a sling and hoisted on board the "Helene" (transcript, pp. 97-8). On cross examination, he said that they were obliged to use an ordinary box that passengers were landed in, in order to get libellant from the steamer to the shore (transcript, p. 104).

Libellant himself testified that when he was struck with the sling load of sugar, he was jammed up against the boat and fell into it, becoming unconscious; that he did not know anything that occurred after he was struck by the sugar up to the time he reached the steamer (transcript, p. 115). He further testified that his collar bone was broken; that he was brought back to Honolulu and taken to the Queen's Hospital. "The collar bone had been pain- " ing me and I had pains in the shoulder. This does

" not pain me all the time; some days I am all right and " sometimes it pains me off and on." He was in the Queen's Hospital six weeks after he had been treated for a time in the Plantation Hospital (transcript, pp. 116-7). He further testified that he had suffered pain all over his body and that at night time the pain had been so intense that he could not sleep, which was not his condition at the time he testified, although then he continued to have pains in his shoulder. He then proceeds to testify as follows:

" Q. How long after you arrived at the Queen's Hos-
" pital did these pains continue?

" A. About three weeks after I arrived at the hos-
" pital my pain kind of eased off—pain in the collar bone.

" Q. Then after that time you experienced no other
" pain?

" A. I have had pain in my shoulder, not continual
" pain, but at times, off and on.

" Q. How long after the first pain was it when the
" second pain started in your shoulder?

" A. I think a week after the pain went away from
" the broken collar bone that pain appeared in my shoul-
" der.

" Q. So that, as I understand the situation, the first
" pain was the pain of the collar bone fracture, and the
" second pain, which came after the first pain eased off,
" was in the shoulder?

"A. Yes, the first pain in the broken collar bone, the
" second was here in the shoulder.

" Q. You say the second pain you experienced, that

" it was off and on. That was off and on. What do you " mean by that?

" A. Sometimes when walking in the streets and shift- " ing my hand—that is, back and forward, and times " when I jerked it was the time the pain started; some- " times it would pain all day and all night and the next " day, and then the pain will leave me.

" Q. So that at times the movements of the arm will " start this pain?

" A. When I walk in the streets I cannot swing my " hand; I have to hold it up in this position (indicating " a position of right angles to his body). If I swing it " in the streets it starts to pain me" (transcript, pp. 118-9).

He further testified that he was not doing any work as a sailor or otherwise or able to lift articles or work at his business. He first went to a hospital at the plantation and a week thereafter came to the Queen's Hospital in Honolulu (transcript, pp. 122-3, 134). On cross examination he testified:

" Q. Will you describe what effect it had upon you?

" The Court. Just ask him how it affected him, that " is what the question was.

" A. I fainted after I was struck.

" Q. So you didn't feel anything?

"A. No, I didn't feel anything after that.

" Q. How did you know about where you fell in the " boat?

" A. I didn't know where I fell in the boat.

" Q. As I understood your testimony this morning, the

" first thing you did know was when you were in the " captain's stateroom? * * *

" A. The first time I came to know anything was when " we were about alongside the steamer, and they were " preparing to put me in the sling. That was the first " time I knew what I was about.

" Mr. STANLEY (to the interpreter). Tell him that I " don't want to be unfair. Tell him to answer the ques- " tions deliberately, and take all the time he wants.

" Q. How were you taken aboard the steamer?

" A. I was put in a sling, the usual sling for sugar " purposes. They lowered it down and I sat in the mid- " dle and was hoisted aboard.

" Q. You were sitting in the sling?

" A. They put the line over me and it was hoisted " up.

" Q. How did you hold on to that sling?

" A. I held on with my left hand. They held me in " with the rope's end" (transcript, pp. 132-3).

He then shows that it was three weeks after he came to the Queen's Hospital before they took the bandage off his shoulder, the first bandage having been taken off and a new one put on; and that he had done no work since he met with the accident. He had been keeping his arm in practically the same position and had not done anything with it. He first felt the other pain he spoke of, that is, the pain in the shoulder, sometime after the doctor had taken the bandage off his arm (transcript, pp. 135-6).

" Q. I understand you feel it sometimes whenever you " attempt to move your arm?

" A. Yes. And sometimes when I move in the night " it pains me, especially at night time when I try to turn, " that starts the pain.

" Q. Whereabouts in your shoulder have you got pain?

" A. Right on top, right in here, in the bone here (indi- " cating).

" Q. In the top of the arm?

" A. Yes, right here.

" Q. Right down here over the arm?

" A. Above the shoulder and down.

" Q. How far above?

"A. Just right on the shoulder here (indicating), and " down below.

" Q. You mean right down over the place where the " broken bone is?

" A. The place where the broken bone is is a differ- " ent place from where it is now. The broken place is " farther away than where the pain is.

" Q. You feel that whenever you swing your arm or " turn over at night in your sleep?

" A. The only time I feel the pain very much is at " night time when I turn over. It does not hurt so much " when I swing my arm" (transcript, pp. 136-7).

Dr. Humphries, called on libellant's behalf, testified from the symptoms shown by the evidence, particularly from the intermittent pain which did not exist in the immediate vicinity of the fractured clavicle, that tuberculosis might have set in, in the articulation itself, as the result of the injuries, or the symptoms disclosed might indicate neuralgia of the joint (transcript, pp. 142-3). He

said that if the joint had become tubercular in character, libellant might lose his arm or shoulder joint or even his life. The effect surely would be to shorten his life, but then if neuralgia had set in, it might pass away, or it might not; possibly amputation would be necessary, followed later by a deformity or a contraction. The doctor was inclined to believe that the trouble was neuralgic but he would not say it was not tubercular in character.

" Q. Assuming that this case exhibits neuralgia of " the joint, in your opinion would that incapacitate this " man from earning a living?

" A. It is impossible to say; it might come to ampu- " tation.

" Q. In you opinion, would you say the injury was " serious?

" A. Since yesterday I would say it certainly was" (transcript, p. 144).

Upon his cross examination Dr. Humphries testified as to the number and dates of the examination of the libellant made by him, having made the second examination the day before he was called upon to testify, and he gives his reasons why he has reached the conclusion to which he testified (transcript, pp. 154-6). In further replying to appellant's counsel, he testified as follows:

" Q. Is there anything external, Doctor, to indicate " the presence of such complications?

" A. External, you say?

" Q. Yes.

" A. The callous on the collar bone.

" Q. What does that indicate?

" A. The hardness of the callous would show a superficial union only.

" Q. Would that the fact that he is suffering pain when he jerks his arm suddenly or when he rolls in bed at night, would that indicate that the fracture is not properly united?

" A. He has no pain in reference to the point itself.

" Q. He says he feels pain in the shoulder?

" A. Yes, his statements are quite possible. (To Mr. Dunne.) 'Might I ask you how long his shoulder has been out of bandages'?

" Mr. Dunne. Three weeks after he arrived at the hospital. He was injured the 19th and taken into the hospital the 22nd. Three weeks from the 22nd of March.

" A. (continued) I would like distinctly to say that it would be a week that there would be pain in the arm and then the pain would cease, but he would have to get back the use of his arm.

" Q. You have heard what he said; that he carried his arm in a sling, that whenever he moved his arm suddenly and whenever he rolled at night it pains him. Would that effect be explained by not attempting to use his arm? Would that explain his pain in the shoulder caused by sudden movements?

" A. I should think that within three weeks the clavicle pain would be *pau* (extinct).

" Q. Even if the man had not used his arm in any shape or form, would he not experience pain if he attempted to use it in any way after its being bandaged up for three weeks?

" A. If he didn't use that arm for any purpose what-
" ever, not even for putting on his coat, I would agree
" with you.

" Q. If he did nothing at all?

" A. If he didn't use his arm at all. But I under-
" stand in the first place that he did attempt to use it.

" Q. Would not he experience pain in the shoulder
" if the man carried his arm bandaged for three weeks?

" A. If he carried his arm that length of time, and if
" he did not attempt to feed himself, I would agree with
" you.

" Q. You have heard the testimony.

"A. I say I heard him testify that when out in the
" street whenever he swung his arm he felt this pain"
(transcript, pp. 148-9).

His cross examination closed with the following testimony:

" Q. You are not prepared to say that tuberculosis
" exists?

" A. No.

" Q. You are not prepared to say it is neuralgia?

" A. No, but in my opinion it is one or the other.
" * * *

" The Court. If your fears should prove to be true,
" what then?

" A. If he has tuberculosis, he may never go to work
" again. If tuberculosis exists at the joint it destroys
" the articulation and may destroy the life.

" The Court. Any time?

" A. Yes.

" Q. Would he be able to do light work?

" A. Yes.

" Q. On board ship?

" A. Yes.

" The COURT. Is there such work as light work on " board ship?

" A. I never heard of any" (transcript, p. 151).

On his redirect examination, he stated, in reply to a question by counsel for libellant, that if the latter had neuralgia, it is impossible to say how long he might probably live. It might cause contraction, resection or even amputation and cancer might be started by neuralgia of the joint.

Captain Nicholson says, on his direct testimony, that after libellant had been hoisted up on the steamer from the small boat:

" I took him to my room and felt his collar-blade, and " found it broken in two places. I made the steward " hold it there until I bandaged it, but I saw that was " no good, it sprung out again, so I sent the boat in for " the box; the box that we use to take passengers ashore " in. When the box came in I put him in the box, and " sent him ashore to Mr. Gibbs, the manager.

" The COURT. That is, you did everything you could " do yourself, while you had him under your control?

" A. Yes, sir; I did what I could, but I have not much " knowledge in that line, so I sent him to get medical " aid.

" Q. Why did you do that?

" A. For the simple reason that I did not know enough " to set that collar bone properly. Whenever he moved,

" it would pull down and cause him pain, so I said he had " better go ashore to the first doctor" (transcript, p. 166).

Dr. Wood, who was called on appellant's behalf, testified that upon examining libellant:

" I found a newly united fracture of the right clavicle " about the middle. I will state that I knew that the " object of the examination I was making was to find out " what his injury was, for court purposes. I examined, of " course, first the fracture itself; I found, as I stated, a " newly united fracture. Then I conducted an examination " with the object of finding if the union which had formed " was strong enough to resist some force, and to what " extent, if any, the usefulness of the limb was impaired " at that time, whether he had some voluntary use of " his arm, and if so, how much, the amount of pain he " might have suffered from the injury to his arm and " shoulders. And also the object of finding whether I " could discover any complications outside the fracture.

" Q. As a result of your examination, what do you " say as to the usefulness of his arm, that was fractured?

" A. The right arm, to be definite.

" Q. The right arm?

" A. He can use it some at present, but not to a great " extent. He used it to remove his shirt; I did not ask " him to use it for that purpose, but in my examination " of him I tested the use of his arm for my own infor- " mation. * * *

" Q. In your opinion will the complete usefulness of " the libellant's arm be interfered with in any way by " the fracture?

" A. I think not permanently. It will take time to " get complete usefulness of the limb, of course, but I " think in time he will have perfect use of his arm. * * *

"A. I am talking of the collar bone. That is one of " the bones from which we expect good results. * * *

" Q. Was there any evidence of a permanent injury?

" A. A fracture of the clavicle is a permanent in- " jury.

" Q. Permanent injury to the usefulness of the limb, " the arm, the right arm?

" A. Nothing that leads me to believe or say that " the usefulness of that arm would be sorely impaired.

" Q. Is it not a fact that in the case of a simple " fracture of the clavicle, the complete and unrestricted " usefulness of the arm is not interfered with?

" A. It is so stated in the text books, and that is my " experience in uncomplicated fractures" (transcript, pp. 206-08, 210).

On cross examination he said that he did not make any special examination of libellant for the purpose of discovering the presence or absence of incipient neuralgia or tuberculosis of the joint (transcript, p. 211), and proceeds:

" A. I should say if a great weight fell on one's chest— " people have a habit of dating back to injuries of that " kind all future results that may develop. Of course " there may be internal injuries that will not be de- " tected, or there may be injuries not detected in the " examination.

" Q. With reference to this examination, would it be

" possible to discover neuralgia or tuberculosis of the joint " at a single examination, where there was no paroxysm " of pain, what do you say?

" A. There was no neuralgia. As far as tuberculosis " is concerned in this case—I was not looking for special " complications, I was looking for the ordinary compli- " cations. There might be a great many things that he " might have had, that I did not look for in the examina- " tion. I would not undertake to say until I examined " him for that point, that is, if he had neuralgia or tuber- " culosis, or anything in that category.

" Q. If it were true that, say, a man sustained a frac- " ture of the clavicle fifty days ago—let us say it was " true—that the bandages were removed three weeks " later, we will say that it is also true, that the pain in- " cident to the original reception of the injury had ceased " at the same time, or thereabouts, and a fresh or new " and independent pain had made its appearance at the " shoulder at the joint?

" A. You mean in the shoulder joint?

" Q. A cutaneous pain in or about the shoulder joint. " Would you say if these facts were established, that " it indicated a tubercular disease of the joint?

" A. I would examine him further for a tubercular " joint.

" Q. Suppose you should find that it not only com- " menced shortly after the original traumatism, but that " it was intermittent, would not that suggest to you, as " a professional man, the presence of either tuberculosis " or neuralgia?

" A. Those two symptoms belong to neuralgia, inter-

" mittent and cutaneous. Any pain might be intermit-
" tent, especially as you didn't qualify as to whether there
" is or there is not motion.

" Q. Is not neuralgia caused by injury to the nerves,
" sometimes?

" A. Any injury to the nerve might cause neuralgia.

" Q. Suppose a man lies down in his bed and tries
" to go to sleep, rolls over and that pressure causes the
" pain to appear in or about the fracture in the shoulder,
" what would you say to that?

* * *

" Q. All these conditions I have referred to, neuralgia
" and tuberculosis, they are rather serious, are they not?

" A. Tubercular joint is decidedly serious. It could
" not be more serious. As to neuralgia in any part of
" the body, it is harder to answer the question, because
" it is such an erratic disease. It might leave after treat-
" ment and it might not leave at all.

" Q. Tuberculosis does sometimes result in losing the
" arm and also in death?

" A. It often does.

" Q. Are there not cases of neuralgia of the joint
" where desperate measures are necessary?

" A. There are extreme cases of neuralgia, in which
" such desperate measures as amputation are necessary.
" The patient can get no peace or sleep, and something
" has to be done" (transcript, pp. 212-14).

Dr. Cofer, also called on appellant's behalf, said that he made a cursory examination of libellant, finding the man in a good condition as far as he could judge from

an examination of that nature; that he saw him again at the time when Dr. Wood informed him that the latter had been retained as an expert in connection with this case. Witness did not examine libellant but he saw Dr. Wood examine him and "that is about all the connection " I had with him" (transcript, p. 216). Dr. Cofer thought that libellant's arm could be used in the course of a month, in which event he should have permanent recovery, provided he had a chance to get light exercise and was willing to take advantage of it (transcript, pp. 217-8), and he saw no signs of complication in the injury, admitting "any fracture will be a permanent injury because " the bone will always be broken. In that sense it is " permanent, but I think that after 30 days, provided he " does light work, in order to get the muscles in train- " ing, that it will not be a permanent injury in that sense" (transcript, pp. 218-9). He further said that if nothing went wrong, a man sustaining a fracture of the clavicle was usually discharged from the hospital at the expiration of six weeks from the time of the accident (transcript, p. 219). On his redirect examination, in reply to the question propounded by his counsel,

" Q. It would be something exceptionally rare to have " tuberculosis develop from a simple fracture of the clavi- " cle?"

he said,

" That could be better answered by Dr. Wilson or Dr. " Sinclair, who had charge of this particular case and " know what it shows. I would rather not answer that " question until after looking up the authorities. I can-

" not keep in my head the statistics necessary to answer " that question" (transcript, p. 223).

Dr. Wood was thereupon recalled, on appellant's behalf, testifying in part as follows:

" Q. Will you state the result of the examination?

" A. I would say that I was called to examine the " libellant and determine whether I found any symptoms " of incipient tuberculosis or neuralgia of the joint. That " is to say, I made another special examination along " those lines. As far as my own opinion is concerned, I " should bar out neuralgia of the joint. Rather to the " surprise of both of us, he has a temperature of 100½ " and a pulse which is over 100, which means he has some " acute inflammatory trouble if he did not have the pulse " and temperature previously. His coat is coated and red- " dened along the borders, indicating digestive troubles, " such as dengue fever. What should be inferred from " that pulse and that temperature, I am not willing to " say on so short an examination. I re-examined the " joint and I am satisfied he has not neuralgia. I saw " no signs of tuberculosis with the single exception of " the increased pulse and temperature and the appar- " ent increased pain in moving the joint.

" The Court. What is normal?

" A. Ninety-eight and two-fifths to ninety-eight and " three-fifths.

" The Court. What would be the normal pulse?

" A. The normal pulse?

" The Court. For a man of his years?

" A. The individuality also enters into it. Sometimes

" it gets down to 60 or 70 and sometimes as high as " 80. I believe the life insurance companies will not " allow their examiners to pass a man whose pulse is over " 84 to 86. They will have you examine him another " day. I presume that an average would be 76 to 80.

" The COURT. What was this man's pulse?

" A. Fifty odd beats in half a minute.

" The COURT. That is unusual?

" A. It means fever.

" The COURT. Can a man have that pulse and that " temperature and be well?

" A. Oh, no.

" Q. It might be dengue?

" A. Anything that produces fever would give that " temperature and that pulse" (transcript, pp. 224-5).

Finally Dr. Humphries was recalled on libellant's behalf, and testified:

" Q. (By Mr. Dunne). I wish to ask you, Doctor. " concerning this examination of the libellant which you " made a few moments ago in connection with Dr. Wood. " Will you kindly state the result of that examination?

" A. Dr. Wood conducted the examination and I " watched him. There was pain on deep pressure. Doc- " tor placed his finger in the arm-pit, and we were both " satisfied that there was pain.

" Q. What else was observed?

" A. He had increased pulse and temperature.

" Q. What was his temperature?

" A. One hundred and one-half, two degrees of fever.

" Q. The pulse?

" A. Over 100.

" Q. Would you call that temperature and that pulse " normal?

" A. Oh, no.

" Q. In what respect was it abnormal?

" A. It was two degrees of temperature above nor- " mal. The pulse is twenty beats, certainly too fast to " the minute.

" Q. From what you have observed in the case and " what you saw just now, and knowing the history of the " case, what would you say as to whether the symptoms " are consistent with incipient tuberculosis?

" A. They are.

" Q. I will ask you whether a man exhibiting these " conditions and symptoms would be recommended to go " to work by any Christian physician?

" A. I do not think so.

" The Court. How much fever did you say he had?

" A. Two degrees. The range of fever is only 8 de- " grees.

"Q. Is this man an insurable risk?

" A. He is not insurable in any company. His pulse " and temperature would veto it.

" The Court. Did the man appear to be sober?

" A. Yes" (transcript, pp. 229-230).

The foregoing excerpts show, we respectfully submit, that the injuries sustained by Palapala were far more serious that a mere simple fracture of the clavicle and fully sustain the finding of the learned court below that his present and immediate future earning capacity was

totally impaired. In this connection, it may be well to call to the court's attention, in view of the affidavits which have been submitted recently on appellant's behalf on its motion for leave to take new testimony, that C. L. Wight, one of its witnesses, president of the Wilder Steamship Company, stated on the witness stand that his company was willing to give the libellant the kind of work he was able to do in his then present condition (transcript, p. 227), and yet in the moving affidavit of Joseph James Fern, who is employed by the Wilder Steamship Company to hire and discharge its seamen and stevedores, it appears that Palapala has on several occasions since July 27th, 1903, requested Fern to give him regular employment as a sailor, which was refused, libellant thereby showing, as is further stated in his own affidavit, that he was trying to do everything he could to keep from being a charge upon his family or friends, although the Steamship Company for which he had formerly worked, knowing undoubtedly his present incapacity to perform any serious manual labor, was unwilling, despite the statement in court of its president, to afford him the opportunity for such service as he could render.

There was little chance for the practice of any deception on libellant's part regarding the character of his injuries. Not only does his testimony appear straightforward and free from suspicious circumstances, but he was also subjected during the trial to an examination at which appellant was represented by some of its medical witnesses; and after that examination Dr. C. B. Wood was recalled as a witness for appellant and admitted that

he was surprised to find that libellant had "a tempera-
" ture of 100½ and a pulse which is over 100, which means
" he has some acute inflammatory trouble, if he did not
" have the pulse and temperature previously". He was unwilling, however, to state what inference should be drawn from those symptoms, although he felt satisfied that he did not have neuralgia of the joint. He admitted that the injury might end in tuberculosis (transcript, p. 226).

Here, then, is a man of no means, young, just entering upon a career of active work, and up to the time of the accident strong, healthy and able to follow a calling requiring vigor and strength. His health formerly was his only capital, and it appears that he has been now deprived of that, not merely temporarily or for the immediate future, but to a greater or less extent, which is yet problematical, permanently. He has shown beyond any contradiction, as elements of the damage which he has sustained, the physical pain which was attendant upon the injury and the mental suffering which not only inevitably accompanies the physical pain, but also caused by worry at his inability to support his father. He contributed to his father's support, as is shown by his own and Toka's testimony. The evidence shows that Fern knew what arrangements libellant had made for the support of his father, and yet appellant failed to put this man upon the stand, if a contradiction of this testimony were possible. Finally, libellant has suffered a severe temporary, perhaps permanent, loss of earning capacity. He is unable to work at his customary calling, despite his

praiseworthy efforts to relieve himself as far as possible from being a burden upon his friends.

Relative to the measure of damages, the following authorities to which we respectfully invite the Court's attention, are important:

Grant v. U. P. R. R. Co., 45 Fed. 673;
Sproule v. Seattle, 17 Wash. 256, 262;
West Memphis Packet Co. v. White, 41 S. W. 583-7;
Schultz v. Chicago etc. R. R., 48 Wis. 375, 383;
Newport News etc. R. R. v. Campbell, 25 S. W. (Ky.) 267;
The Mineola, 44 Fed. 143;
The Slingsby, 116 Fed. 227;
Dist. of Col. v. Woodbury, 136 U. S. 450, 459;
W. & G. R. R. Co. v. Harmon, 147 U. S. 571, 573-4.

We may say in conclusion that the trial court was in a better position than is the appellate court to determine the facts of this cause. In the court below the witnesses were all examined orally in court; there was no deposition taken and that court had the opportunity of judging the demeanor of each witness when upon the stand, his apparent candor or lack of candor and manner, whether hesitating or otherwise, in which he gave his testimony. This court is deprived of those advantages and as the testimony which appears of record amply warrants the conclusion drawn by the lower court, we respectfully submit that this court should affirm the decree.

PAGE, MCCUTCHEN & KNIGHT,
J. J. DUNNE,
Proctors for Appellee.